severed in the instrument creating them,[18] the result reached in these cases should rather be recognized as a new exception to the general principle.

LIABILITY FOR INJURIES BY ANIMALS.—A man may be held responsible for the harm done by an animal because of actual fault on his part just as for a wrongful or negligent use of any other property.[1] Where the animal belongs to a harmless species and the owner has no reason to suppose that it is vicious, there is no liability without proof of such fault.[2] But if a man owns or harbors[3] an animal of a dangerous species,[4] or one that is vicious to his knowledge,[5] the probability of its causing injury creates a more comprehensive basis of responsibility independent of the ordinary rules of negligence.[6] In a few jurisdictions, nevertheless, the liability even in these cases rests on negligence, which is presumed, however, from proof of the injury, ownership or harboring, and, if the animal is harmless by nature, *scienter* of its viciousness.[7] The *prima facie* case thus established may be rebutted by showing that the owner has exercised a degree of care commensurate with the requirements of the situation.[8]

From the earliest period of the common law, however, it has been held that one who keeps a wild animal,[9] or a tame one with knowledge

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[18] *In re* Harvey *supra.*

[1] Dickinson *v.* McCoy (1868) 39 N. Y. 400; Clowdis *v.* Fresno Flume etc. Co. (1897) 118 Cal. 315.

[2] Haneman *v.* Western Meat Co. (Cal. 1908) 97 Pac. 695; Reed *v.* Southern Express Co. (1894) 95 Ga. 108; Oldham *v.* Hussey (1905) 27 R. I. 366.

[3] It is immaterial that the defendant did not own the animal if he harbored it. Quilty *v.* Battie (1892) 135 N. Y. 201; Plummer *v.* Ricker (1898) 71 Vt. 114; see Boylan *v.* Everett (1899) 172 Mass. 433.

[4] The classification of animals into animals *ferae naturae* and animals *mansuetae naturae* has been borrowed from the law of property, although it is not strictly applicable to this class of cases. Earl *v.* Van Alstyne (N. Y. 1850) 8 Barb. 630; Filburn *v.* People's Palace and Aquarium Co. (1890) L. R. 25 Q. B. Div. 258; Parsons *v.* Mauser (1903) 119 Ia. 88.

[5] Such an animal has been treated in the same way as an animal naturally dangerous. Laverone *v.* Mangianti (1871) 41 Cal. 138; Jackson *v.* Smithson (1846) 15 M. & W. 563; but see Holmes, Common Law 157, 158.

[6] Emmons *v.* Stevane (1908) 77 N. J. L. 570; Harris *v.* Carstens Packing Co. (Wash. 1906) 16 L. R. A. [N. S.] 1164 and note; Popplewell *v.* Pierce (Mass. 1852) 10 Cush. 509; May *v.* Burdett (1846) 9 Q. B. 101; Barnes *v.* Lucille Ltd. (1907) 96 L. T. 680. So contributory negligence in the ordinary sense is no defense. Mann *v.* Weiand (1875) 81* Pa. St. 243; Marble *v.* Ross (1878) 124 Mass. 44; and see Meibus *v.* Dodge (1875) 38 Wis. 300; Schilling *v.* Smith (N. Y. 1902) 76 App. Div. 464, for what is contributory negligence in children. Nor is it a defense that the plaintiff was a trespasser. Sherfey *v.* Bartley (Tenn. 1856) 4 Sneed 58; but see Lowery *v.* Walter L. R. [1910] 1 K. B. 173.

[7] Hayes *v.* Smith (1900) 62 Oh. St. 161, 182; Thomas *v.* Boyson (1901) 21 Oh. C. C. R. 302; see also Fake *v.* Addicks (1890) 45 Minn. 37; Bentz *v.* Page (1905) 115 La. 560.

[8] See cases in note 7.

[9] Hayes *v.* Miller (Ala. 1907) 11 L. R. A. [N. S.] 748 and note; Filburn *v.* People's Palace and Aquarium Co. *supra.*

of its vicious character,[10] does so at his peril.[11] The gist of the action, according to some courts, is the keeping of the animal with knowledge of its vicious propensities.[12] Assuming this conception to be the proper one the owner would be an absolute insurer. In accordance with this view the position taken by the English court in *Baker* v. *Snell*,[13] holding the owner responsible even where the injury was caused by the interference of a third person, would be justifiable. Moreover, if keeping the animal is the wrong on which the action is based the same liability would attach even though the injury was caused by an act of God or the public enemy. But as it is not unlawful to keep dangerous animals,[14] where they are not in themselves nuisances,[15] this statement of the gist of the action is inconsistent and an inaccurate use of terms. The keeping being innocent, liability for injury due to no fault of the owner must be placed on another ground.

The true basis of liability would seem to rest upon considerations of policy irrespective of fault[16] which have found similar expression in the responsibility for fire and for trespassing animals,[17] and more recently in the rule laid down in *Rylands* v. *Fletcher*.[18] Under the doctrine of this case, whereby a landowner is said to keep dangerous things upon his land at his peril, there is, however, no liability if the injury was caused by an act of God or the public enemy, or by the intervention of a third party.[19] These defenses, modifying the rigor of the policy here

[10]This may be shown by proof of facts sufficient to impute to the owner knowledge of the dangerous character of the animal. Duval *v.* Barnaby (N. Y. 1902) 75 App. Div. 154; Jones *v.* Perry (1796) 2 Esp. 482; Warner *v.* Chamberlain (Del. 1884) 7 Houst. 18; see Benoit *v.* Troy etc. R. R. Co. (1897) 154 N. Y. 223. So the knowledge of one in charge of the animal is sufficient to impose a liability upon the owner. Meilke *v.* Schabble (1909) 159 Mich. 163; Applebee *v.* Percy (1874) L. R. 9 C. P. 647. It is for the jury to determine whether or not there was sufficient *scienter*. Thornton *v.* Layle (Ky. 1908) 111 S. W. 279; Spring Co. *v.* Edgar (1878) 99 U. S. 645.

[11]1 Hale P. C. 430; Smith *v.* Pelah (1766) 2 Stra. 1264; May *v.* Burdett *supra;* see also Rex *v.* Huggins (1730) Ld. Raym. 1574, 1585; Brock *v.* Copeland (1794) 1 Esp. 203. For a discussion of the sources of the common law rule see Wigmore, Tortious Responsibility, 3 Select Essays 489-492, 512-520; Holmes, Common Law 15-24.

[12]Muller *v.* McKesson (1878) 73 N. Y. 195; May *v.* Burdett *supra;* Card *v.* Case (1848) 5 C. B. 622.

[13]L. R. [1908] 2 K. B. 825. For a discussion of this case see 9 COLUMBIA LAW REVIEW 277; Beven, Responsibility at Common Law for the Keeping of Animals, 22 Harv. L. Rev. 465.

[14]Woodbridge *v.* Marks (N. Y. 1897) 17 App. Div. 139; Hayes *v.* Smith *supra;* see Jackson *v.* Baker (1904) 24 App. D. C. 100. See also Cooley, Torts (3rd ed.) 706; Beven, Responsibility for the Keeping of Animals *supra.*

[15]Speckman *v.* Kreig (1899) 79 Mo. App. 376; Boulton *v.* Banks (1633) Cro. Car. 254; Smith *v.* Pelah *supra.*

[16]See Holmes, Common Law 116-120, 155-158.

[17]Wood *v.* Snider (1907) 187 N. Y. 28; Decker *v.* Gammon (1857) 44 Me. 322; Ellis *v.* Loftus Iron Co. (1874) L. R. 10 C. P. 10; *contra* Johnston *v.* Mack Mfg. Co. (1909) 65 W. Va. 544.

[18](1866) L. R. 1 Ex. 265, (1868) L. R. 3 H. L. 330. See also Bohlen, The Rule in Rylands *v.* Fletcher, 59 Pa. L. Rev. 298, 306.

[19]Box *v.* Jubb (1879) L. R. 4 Ex. Div. 76; Nichols *v.* Marsland (1875) L. R. 10 Ex. 255.

referred to, seem equally applicable to actions for injuries by animals, and would relieve the owner from responsibility in such a case as *Baker* v. *Snell*. But, in view of the fact that the liability is based upon policy, the court in any given jurisdiction may properly determine its extent, and upon this ground alone can the extreme English doctrine be justified. In this connection it may be proper to take into consideration the utility of the animal, as a stricter rule may well be applied where it serves no useful purpose.[20]

Even where the circumstances subject the owner to absolute liability, however, it would seem that recovery in negligence is not necessarily precluded. In the recent case of *Gropp* v. *Great Atlantic & Pacific Tea Co.* (1910) 126 N. Y. Supp. 211, the plaintiff sued for injuries caused by driving a horse in such a negligent manner that it ran away, but on the trial secured permission to amend his complaint by inserting an allegation that the defendant's servant drove the horse in a city street, knowing it to be inclined to shy and run away under such circumstances. The court held that, as this was also an action based on negligence, the amendment was proper, one judge dissenting on the ground that, as the liability under the complaint as amended was absolute, the cause of action had been changed. Since the plaintiff proved that the defendant's servant, in the course of his employment, brought the horse to a place where he knew it might cause damage, which was an act of negligence,[21] the cause of action thus remaining unchanged, it is immaterial that the doctrine of absolute liability could have been applied.

NATURE AND CREATION OF THE RIGHT OF LATERAL SUPPORT.—The right to lateral support for land in its natural condition has generally been treated as a natural right inherent in and passing with the soil.[1] From this fundamental conception it follows that any material infringement thereof by a landowner to whom the burden of support extends, whether he be an immediately adjoining proprietor or not, is actionable,[2] irrespective of the question of negligence or due care.[3] Although the soundness of the doctrine that one cannot likewise demand support for improvements placed upon his land has occasionally been doubted,[4] the decisions have uniformly refused to recognize such a right as a

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[20]See Nichols *v.* Marsland *supra;* Jackson *v.* Baker *supra;* Lowery *v.* Walter *supra;* Cooley, Torts 706. Statutes may be considered indicative of each state's policy. See Holmes *v.* Murray (1907) 207 Mo. 413; Peck *v.* Williams (1903) 24 R. I. 583; Carroll *v.* Marcoux (1903) 98 Me. 259; Osborne *v.* Chocqueel L. R. [1896] 2 Q. B. 109; Briscoe *v.* Alfrey (1895) 61 Ark. 196.

[21]See Benoit *v.* Troy etc. R. R. Co. *supra;* Baldwin *v.* Ensign (1881) 49 Conn. 113; Mitchil *v.* Alestree (1677) 1 Ventr. 295; Hudson *v.* Roberts (1851) 6 Ex. 697.

[1]McGuire *v.* Grant (N. J. 1856) 1 Dutcher 356; see Stevenson *v.* Wallace (Va. 1876) 27 Gratt. 77.

[2]Brown *v.* Robins (1859) 4 H. & N. 185; *cf.* Birmingham *v.* Allen (1877) L. R. 6 Ch. Div. 284; see also Gilmore *v.* Driscoll (1877) 122 Mass. 199.

[3]Gilmore *v.* Driscoll *supra;* see Humphries *v.* Brogden (1850) 12 Q. B. 739.

[4]See Farrand *v.* Marshall (N. Y. 1855) 21 Barb. 409.